

MEMORANDUM OF LAW

DATE: October 28, 1991

TO: Councilmember Tom Behr

FROM: City Attorney

SUBJECT: Potential Conflict of Interest on Item 333
on Docket of October 29, 1991

FACTUAL BACKGROUND

For over forty (40) years, Kearny Mesa has been promoted as an industrial center but its land use is predominantly governed by the Serra Mesa Community Plan which was adopted in 1977. Spurred by the loss of industrial uses, the Kearny Mesa area now seeks its own community plan, culminating in the far-reaching noticed public hearing of Item 333 on the docket of October 29, 1991. While the documents amount to over five (5) inches of printed material, they can be summarized as follows:

1. Establishment of the Kearny Mesa community planning area as an area separate from the Serra Mesa community planning area.
2. Adoption of the proposed Kearny Mesa Community Plan.
3. Adoption of amendments to the Serra Mesa Community Plan to reflect the proposed separation of Kearny Mesa from Serra Mesa.
4. Adoption of amendments to the Progress Guide and General Plan to reflect the proposals contained in the Kearny Mesa Community Plan.
5. Adoption of the proposed Kearny Mesa Public Facilities Financing Plan.
6. Certification of Environmental Impact Report No.

DEP-87-0626.

While each of these actions has its own substantive effect, one relevant effect of the Kearny Mesa Community Plan is to impose specific maximum floor area ratios (FARs). (Floor area ratio is the numerical value obtained by dividing the gross floor area by the net area of the premises. FARs are used to achieve a balance between community land use intensities and street system capacities.)

While we have not had the time to detail the significance of the changes, your memo of October 25, 1991 (attached) specifies that your former employer, Solar Turbines, Inc., will be benefited by these land use changes; that while employed by Solar you were "extensively involved

in drafting this Plan"; and that you presently possess 190 shares of Caterpillar, Inc., Solar's parent company, that your most recent SEI (statement of economic interest) lists as valued between \$1,000 and \$10,000.

Against this background you raise the principal question of whether you can participate in the consideration of those items specified infra under Item 333. Recognizing the volume of documents involved and the far-reaching effect of the actions, we agreed to give you a priority review of the matter to answer your principal question of participation.

ANALYSIS

Any analysis of whether a public official may participate in a governmental action must, of necessity, begin with the Political Reform Act of 1974 ("the Act"), as found in California Government Code section 87100 et seq., which provides in pertinent part:

Section 87100. Public Officials: State and Local.

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

As relevant to the instant inquiry, "financial interest" is further defined as follows:

Section 87103. Financial Interest.

An official has a financial interest in a decision within the meaning of section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

a. Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

...

c. Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

Hence we must focus on whether your present stocks or prior employment present a disqualifying financial interest. We address each separately.

A. Investment of \$1,000 or more in any business entity.

As you recognize, your stock represents a direct investment that exceeds the \$1,000 threshold limitation. However, before such an

investment can be deemed disqualifying, it must have a "material financial effect." The Fair Political Practices Commission has formulated the following tests for material financial effect:

18702.2. Material Financial Effect: Business
Entity Indirectly Involved in the Decision

The effect of a decision is material as to a business entity in which an official has an economic interest if any of the following applies:

(a) For any business entity listed on the New York Stock Exchange or the American Stock Exchange:

(1) The decision will result in an increase or decrease to the gross revenues for a fiscal year of \$250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 500 largest U.S. industrial corporations or the 500 largest U.S. nonindustrial corporations, in which case the increase or decrease in gross revenues must be \$1,000,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$100,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 500 largest U.S. industrial corporations or the 500 largest U.S. nonindustrial corporations, in which case the increase or decrease in expenditures must be \$250,000 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 500 largest U.S. industrial corporations or the 500 largest U.S. nonindustrial corporations, in which case the increase or decrease in assets or liabilities must be \$1,000,000 or more.

While neither time nor facts exist to ascertain the precise financial effect of the far-reaching actions on Solar Turbines, in a conversation on October 25, 1991, you indicated that the potential effect of the changed FAR designation poses "substantially increased expenditures beyond \$250,000."

Given your frank and forthright projection of the financial effect and mindful that we must construe the Act "liberally" in order that "conflicts . . . may be avoided" (California Government Code sections 81002; 81003), we advise that your stock interests present a financial

interest that prohibits your participation in the discussion and voting on matters listed infra under Item 333. Parenthetically, you did ask if "participation" meant simply receiving testimony and involvement in discussions on this matter. Participation is defined broadly in 2 California Code of Regulations section 18700. Therefore, in light of the broad definition and our conclusion that you possess a present financial interest, you are advised not to be involved in any of the considerations or deliberations on this matter.

B. Source of income.

While the issue of Solar being a "source of income" provided to the official within the last twelve (12) months is now moot given our advice of a disqualifying business investment, the Fair Political Practices Commission has promulgated the following regulation:

Section 18704. Source of Income (87103(c)).

Source of income, as used in Government Code Section 87103(c), shall not include a former employer if: All income from the employer was received by or accrued to the public official prior to the time he or she became a public

official; the income was received in the normal course of the previous employment; and there was no expectation by the public official at the time he or she assumed office of renewed employment with the former employer.

2 California Code of Regulations 18704.

Hence were the financial interest limited to only your salary from your former employer, "source of income" would not present a disqualification since you have indicated that the three (3) limit-ing factors do exist.

c. Council Policy 000-4

We would be remiss if our disqualification inquiry were limited to the Political Reform Act.

POLICY

It is the policy of the Council that the follow-ing code of ethics be adopted for all elected officials, officers, appointees and employees of The City of San Diego:

First: No elected official, officer, appointee or employee of The City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

¶Emphasis added.σ

Council Policy 000-4

This Council Policy preceded the Political Reform Act and remains a

separate source of inquiry. Your October 25, 1991 memo candidly confirms that while employed by Solar you were "extensively involved in drafting this Plan," as well as having the present financial interest in Solar by virtue of your 190 shares of stock.

While this policy does not have the detailed definitions encountered in the Political Reform Act, it presents in broad terms the age old axiom that public choice must be free of private influence.F

Statesman, yet friend to truth! of soul sincere;

In action faithful, and in honor clear;

Who broke no promise, serv'd no private end;

Who gain'd no title, and who lost no friend.

A. Pope, Moral Essays, 1731.

As detailed infra, your stock interest presents a current financial interest that presents the appearance of impairing your judgment. Moreover, to urge and advance a position so significant as floor areas ratios on behalf of Solar as its employee clearly can be said to "tend to impair" your present position of passing on the wisdom of such a position. Hence we find that Council Policy 000-4 counsels against your participation in the present matter. We are quick to caution that this broad policy must be reviewed afresh as to each fact situation, or its worthwhile purpose would be lost in the speculation of personal perception.

CONCLUSION

Inasmuch as you have a present financial interest by virtue of stock in a business entity that is likely to be materially affected by the actions listed under Item 333 and coupled with your past direct participation in formulating some key provisions of this action item, you are advised to disqualify yourself from participating in hearing or voting on the actions listed in Item 333.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:mb:048(x043.2)

Attachment:Memo

ML-91-88

Mayor and City Council

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October 29, 1991